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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM HOYLE McCRIGHT, JR.,
Petitioner

VS.

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the February, 1982 bank proxy and Federal Reserve System Regulation O questionnaire submitted to and answered by Petitioner, then a bank officer and director, solicit answers that required the listing of Petitioner's undivided interests in land owned as a tenant in common, especially his undivided interests that were smaller than 25%, and more especially, those undivided interests specified in Count 3 of the indictment? This arises because the Court of Appeals has affirmed Petitioner's conviction in this case under 18 U.S.C. §1005 for making a false bank report by failing to list, in answer to the questionnaire, just such an interest in ranch land in which purchase money liens secured a promissory note in which Petitioner owned an undivided 1/6 interest as a tenant in common.

(2) Is not "material"an element of the offense that must be established factually by some evidence, in an 18 U.S.C. §1005 prosecution of a bank director for making a false report to his bank by answering "None" to a question in a bank securities offering questionnaire asking for descriptions of Petitioner's material interests in certain transactions with his bank? This arises because there is no evidence whatsoever in the record in this case by which the "material" element relating to any transaction possibly described in the questionnaire can be determined by anyone.

(3) Does not the "exculpatory no" doctrine apply in a false report prosecution of a bank director under 18 U.S.C. §1005, in a fact gathering process required by the Comptroller of the Currency, to prevent a negative answer to a question asked from being a federal crime if a correct answer would tend only to incriminate the person from whom the answer is elicited?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

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TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William Hoyle McCright, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals, the only opinion in this case, is reported in 821 F.2d 226, and is appended hereto at page A-1.

JURISDICTION

The judgment of the Court of Appeals is dated June 25, 1987, the time of its entry. The order overruling Petitioner's motion for rehearing is dated August 26, 1987. The

statutory provision believed to confer on this Court jurisdiction to review the judgment in question is Section 1254(1) of Title 28 United States Code.

STATUTES AND REGULATIONS INVOLVED

The criminal statute is 18 U.S. Code §1005, set forth at page A-17. The regulatory statute is 12 U.S.C. §375b, set forth at page A-18. Pertinent portions of Federal Reserve System Regulation O (12 C.F.R. §§215.1(b) and 215.2(a)(b)(1) and (2) and (k)) are set forth starting at page A-22.

STATEMENT OF THE CASE

In the trial court, Petitioner was convicted on four felony counts and sentenced to serve three years on each count, to run consecutively, and to pay four $5,000 fines, for a total of twelve years to serve and a $20,000 fine (1 Tr. 28). The Court of Appeals reversed the convictions on Counts 1 and 2 and affirmed the convictions on Counts 3 and 4, ordering the case remanded for re-sentencing. Jurisdiction of the district court was conferred by 18 U.S.C. §3221.

Count 3 charges Petitioner, under 18 U.S.C. §1005, as a bank officer and director, with making a false report to his bank, The First National Bank of Midland, Texas, in response to a proxy and Regulation O questionnaire, by failing to report his interest in land in three particulars, (1) an undivided 6-¼% interest in the Atkins Prospect oil and gas leases; (2) undivided interests in some other oil and gas leases; and (3) a 1/6th right to collateral in a tract of land known as the H. G. Bedford Ranch (1 Tr. 1). The Court of Appeals affirmed the conviction on account of the failure to report the "1/6th right to collateral."

Count 4 charges Petitioner under the same penal statute, as a director of the bank, with making a false report to his bank in June, 1982, in answer to Question 8 of a securities offering questionnaire inquiring about Petitioner's material interests in certain transactions with the bank after January 1, 1981, to which he answered "None" (1 Tr. 1).

In 1980, H. G. Bedford, Rodney Robinson, Sam Conner, Pete Eastup and Petitioner, as tenants in common, bought and accepted conveyance of the Bohannan Ranch near Midland, Texas, partly for cash and partly for promissory notes payable to the selllers made by the buyers secured by vendor's liens and deeds of trust against the ranch land. Title was taken by the purchasers as tenants in common, the undivided interests of H. G. Bedford and Rodney Robinson each being an undivided ¼th interest, and the interests of each of Messrs. Conner, Eastup and Petitioner being an undivided 1/6th interest (Ex. DD-1, DD-2). A year later, the five owners sold the land to Pen-Dee Corporation, partly for cash and partly for wrap-around promissory note in the original principal amount of $2,444,000, which included the unpaid balance of nearly $1,000,000 that was owed to the Bohannan family from the purchase of the year before. This wrap-around note was secured by a second vendor's lien and deed of trust lien against the ranch. The wrap-around note and liens securing the same were owed by the selling co-tenants in the same undivided interests as they had owned the land before the sale of it (Exs. 29, 30, DD, EE, FF, GG, JJ and KK). The Trust Department of the First National Bank of Midland was the collection agent chosen by those interested to collect the principal and interest payments, to remit therefrom the amounts necessary to pay the first lien note holders the installments due them from time to time, and to remit the balance of the payments received to the co-tenants in accordance with their undivided interests in the

purchase money wrap-around note (Ex. KK; 3 Tr. 152).

In 1980, Petitioner bought, paid for and continued thereafter to own an undivided 1/16th interest (6.25%) in the oil and gas leases making up the Atkins Prospect (4 Tr. 38, 42, 44, 46, 47; Ex. UUU).

Starting in 1976, Petitioner began acquiring assignments of interest in certain after payout reversionary interests in oil and gas leases of Wood & Locker, Inc., in which Petitioner's undivided interests were ⅔ of 1%, or less (2 Tr. 102, 107-108, 154; 3Tr. 7-8; Exs. 3 and 4).

The Count 3 questionnaire (Ex. 42), in the cover letter from the bank's comptroller, spoke of gathering information to be published in the 1982 proxy and for compliance with Regulation O. The first page asked for "affiliated & related entities," without further explanation or definition. The next page sought a listing of Petitioner's accociates, defined as his wife, any relative of Petitioner or his wife who had the same home as Petitioner, or who is a director or officer of the bank or its subsidiaries; any trust or other estate in which Petitioner had a substantial beneficial interest or which he served as a trustee or in a similar fiduciary capacity; any corporation or other organization (other than the bank and its subsidiaries) of which Petitioner was an officer or a partner, or which Petitioner, directly or indirectly, was the beneficial owner of 10% or more of any class of equity securities, counting interests of the wife, descendants, parents and their descendants, step-children, and step-parents, with adopted children being deemed children by blood.

Next, under a heading of "Officer, Director and Principal Stockholder Related Interests," the questionnaire elicited the listing of any corporation, partnership, trust,

association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, or other form of business entity (giving a brief description of the principal activities of each such entity) of which Petitioner, his wife, minor children, and any adult child residing in Petitioner's home, separately or acting together, own, control, or have the power to vote 25% or more of the total interest in the entity, or control in any manner the election of a majority of the Board of Directors or other managers of the entity; or own, control or have the power to vote 10% or more of the total interest in the entity if Petitioner participates or has the authority to participate in major policy making of the entity or is a director of the entity, unless no other person owns, controls or has the power to vote a greater percentage of the total interest in the entity, in which event Petitioner should list the entity, whether or not Petitioner was a participant or had the authority to participate in the major policy making functions of the entity.

Nowhere in this February 1982 Count 3 questionnaire was Petitioner asked or directed to list, or otherwise informed that he should list, all of his assets, his interests in land, including oil, gas and other minerals, or any of the undivided interests in land, including oil, gas or other minerals, specified in Count 3 of the indictment.

In June, 1982, Petitioner was asked to answer an "Executive Officers' and Directors' Questionnarie" in order to obtain information "in preparing filings with the Comptroller of the Currency, specifically the Offering Circular" (Exs. 43, 43A and 43B). Question 7 inquires of indebtedness owed to the bank by Petitioner and his associates since January 1, 1981, in excess of $5,000,000. Question 9 asked about payments or proposed payments to the bank or its subsidiaries by any firms, corporations, or other businesses and professional entities with which

Petitioner might have certain connections for property or services in excess of $5,000,000 per year or to which the bank and its subsidiaries owed $5,000,000 or more. Question 8, the "None" answer to which is said to be false in the Count 4 indictment, directed: "With regard to yourself, your associates and/or any firm, corporation or other entity with which you have a position or relationship, please describe any material interest, direct or indirect, in any transaction occurring since January 1, 1981, or in any present or proposed transaction, to which FNB, its subsidiaries or any of the employees' benefit plans, retirement plans or trusts of either FNB or any of its subsidiaries was, is or is to be a party." The direction went on to provide that information need not be furnished with regard to transactions involving routine services as a bank.

The appendix to the questionnaire stated that the term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered. "Associate" was defined as a corporation or organization of which Petitioner was an officer or partner or of which Petitioner, directly or indirectly, was the beneficial owner of 10% or more of any class of equity securities; any trust or other estate in which Petitioner had a substantial beneficial interest, or as to which Petitioner served as a trustee or in a similar fiduciary capacity; and Petitioner's wife or any relative of Petitioner or his spouse who shares Petitioner's home, or is an officer or director of FNB or any subsidiary.

The prosecution at trial made no effort whatsoever to present any proof (beyond the name of the bank and the questionaire itself) which would reveal any facts about the bank, the securities offering, the bank's financial condition,

financial history, or the other relevant matters by which anyone might determine whether any interest in any certain transaction the subject of Question 8 was a material interest that rendered the "None" answer false. Count 4 did not specify what transaction(s) rendered the answer false.

Petitioner did not testify at trial, called no witnesses to testify, and rested when the prosecution rested, challenging the sufficiency of the case made by the prosecution with regard to all four counts of the indictment by motion and renewed motion for acquittal. The aptness of these motions with regard to the embezzlement or misappropriation charge in Count 1, and the kick-back charge of Count 2 were established in the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

1. The mere ownership by a person of land, or undivided interests therein as a common law tenant in common, creates no corporation, partnership, trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization or other form of business entity, no entity, no controlled entity, no related entity, no business organization, no associate, and no affiliate. Neither (1) the Bert Lance 1978 legislation (Pub. L. 95-630, Title I, 92 Stat. 3644); (2) the Federal Reserve System Regulation O (12 C.F.R. §215); (3) the partnership acts of the various states, including the Uniform Partnership Acts, and especially the Texas Uniform Partnership Act, Art. 613b, Revised Civil Statutes of Texas, 1925, as amended, and particularly Section 7 thereof; (4) other rules and regulations applicable to national banks; (5) the common law of the various states, especially Texas; nor, (6) most importantly, the Count 3 questionnaire and the instructions thereto, purport to change this result.

Land and undivided interests therein of a tenant in common, being inert, witless, and mindless, have no capacity and no ability to do business with banks for themselves, or for any being, natural or artificial; to borrow money; to have bank accounts to overdraw; to obtain preferential treatment from a bank; or to engage in any other transaction with a bank or its subsidiaries.

The only purpose of the Count 3 questionnaire was to make the bank's records reflect the names and identities of certain closely connected persons and entities of the bank officer, director or control stockholder as to whom the bank is restricted in its dealings and methods of dealing under 12 U.S.C. §375b and Federal Reserve System Regulatin O, and to identify such persons and entities for needed proxy disclosures of certain transactions. These pertain to transactions involving executive officers, directors and control stockholders in the aggregation of loans for loan limit purposes; requirements for prior approval of loans by the Board of Directors (with the director abstaining from participation in the board action on the loan); avoiding preferential treatment by the bank; and prohibiting overdrafts. Certain transactions to be reported in proxies involve events and actions and not the mere ownership of land or undivided interests therein. Such transactions involve people and entities that might own such assets or interests therein or which are empowered by the owner of such assets or interests to act for him in some manner. The Count 3 specified assets could not possibly have transactions and were not, and were not supposed to be, objects of the quest in the Count 3 questionnaire.

Even if the listing of some interests in land were sought, interests in the Bohannon Ranch (on which the Count 3 conviction was affirmed) that were smaller than 25% were expressly excluded from the search, inasmuch as other undivided interest owners, namely H. G. Bedford and Rodney Robinson, each owned undivided 25% interests, in-

terests greater than the Petitioner's undivided 1/6th interest. See 12 C.F.R. §215.2(b)(2)(ii) and the directions in the Count 3 questionnaire for this Regulation O rule.

If in a bank proxy and Regulation O questionnaire the listing of all assets, land, notes receivable, or undivided interests therein of a tenant in common, or undivided interests therein greater than some specified size, is wanted, it is an essential prerequisite that the request for such listing first be made, before the failure to list such can be declared felonious by the courts of the United States.

Yet, in the United States District Court for the Western District of Texas, the case was prosecuted as though the Count 3 questionnaire sought listings of undivided interests in land owned as a tenant in common by Petitioner be such interests less than 25% , 10%, or 1%, and the trial court allowed and upheld the conviction. In the Court of Appeals for the Fifth Circuit, the Department of Justice followed suit as had the prosecution in the court below and the Court of Appeals affirmed.

With bank failures now weekly events, and with the well-publicized assignment of Justice Department task forces to the region that includes Texas to delve into matters of banks, bankers and other federally related credit institutions, prosecutions based on these annual Regulation O-type questionnaires under the provisions of 18 U.S.C. §§1005 and 1006, involving omissions from the answers of land and undivided interests in land, including oil, gas and other minerals, stand to balloon on the strength of the handling of Count 3 in this case by the prosecution with the approval of the courts below.

When a truthful answer to a questionnaire becomes felonious on account of omissions of that which was not directed to be listed, and the listing of which furthermore serves no purpose in the lawful and pronounced federal regulatory scheme, important and costly errors of federal

law have been committed by the courts below without foreseeable likelihood of correction, unless it be by this Court in the exercise of its supervisory powers.

2. A request to list one's material interests in certain transactions for use in preparing and filing an offering statement necessarily involves a finding about what is and what is not material in the context of the judgment processes engaged in by a reasonably prudent investor who will be deciding whether to purchase the securities to be offered on the terms offered and to what extent, if any. The presentation of facts needed to make such a judgment is a subject to which the Securities Act of 1933, as amended (15 U.S.C. §§77a-77aa) is largely devoted, and which provides the pattern for bank securities offering statements (2 Tr. 127-128). Materiality depends on the relevant mixture of facts about the bank, its financial condition, record, history, the securities being offered and the offering price therefor; and poses a fact issue to be resolved by the fact finder possessed of sufficient admitted evidence of that mixture of fact. See *Stier v. Smith,* 473 F.2d 1205 (5th Cir. 1973); *Kasner v. H. Hentz & Company,* 475 F.2d 119, 121 (5th Cir. 1969); *Radiation Dynamics, Inc. v. Goldmuntz,* 464 F.2d 876 (2nd Cir. 1972); *List v. Fashion Park, Inc.,* 340 F. 2d 457 (2nd Cir. 1965); *Aquionics Acceptance Corp. v. Kollar,* 536 F.2d 712, 715 (6th Cir. 1976); *Britt v. Cyril Bath Company,* 417 F.2d 433 (6th Cir. 1969).

The prosecution chose to totally ignore this materiality element of the alleged Count 4 offense. The only relevant evidence was the name of the bank, the fact that the bank failed sixteen months after the "None" answer was given and the $5,000,000 materiality minimum set by the Bank in questions 7 and 9 of the questionnaire. In conventional federal criminal law processes, such total failure to establish by substantial evidence an essential element of the offense charged entitles the Defendant to an acquittal as a matter of law.

The trial and appellate system employed in this case has not yet recognized that the materiality element was a part of the question, and that was just as much an essential element of the offense as any other element. This failure of the lower courts on a matter so basic and fundamental also merits this Court's exercise of its supervisory powers.

3. The June 1982 questionnnaire stems from the requirements of the Comptroller of the Currency. Any transaction in the record was put there by the prosecution in furtherance of its belief that it would tend in some manner to incriminate Petitioner under some one or more of the four counts of the indictment. In what specific manner the "None" answer to Question 8 of the June 1982 questionnaire was false has not been specified.

The United States Court of Appeals for the Fifth Circuit recognizes the "exculpatory no" doctrine as a doctrine applicable to false claims or statements under 18 U.S.C. §1001, but declines to apply the doctrine to prosecutions under 18 U.S.C. §§1005 and 1006 mainly because it is a bank or financial institution (even though federally connected associations which are meeting federal requirements) rather than federal agents who elicit the answers. See *Paternostro vs. United States*, 311 F.2d 298 (5th Cir. 1962). The relevant difference between Section 1005 and Section 1006 is that the former pertains to banks and bankers and the latter pertains to other federally connected credit institutions. The Court of Appeals for the Eleventh Circuit recognizes the applicability of the "exculpatory no" doctrine of 18 U.S.C. §1006 in cases primarily because of the self-incrimination aspects of questions asked at the behest of the United States, unless the matter be waived. See *United States v. Payne*, 750 F.2d 844,861-866 (11th Cir. 1985). Because Petitioner has done nothing to waive his immunity from self-incrimination under the Fifth Amendment of the Constitution, the ap-

parent conflict of decisions between the courts of appeal of the two circuits should be resolved by this Court.

CONCLUSION

The Count 3 and 4 decisions of the Court of Appeals pose serious threats, not only to Petitioner, but as well to those officers, directors and stockholders of banks and federally related credit instituions to whom these kinds of questionnaires have been submitted. Such questionnaires and inattention to the purposes served by such questionnaires and the actual written directions to be followed, under the decision of the Court of Appeals in this case create unfair traps that become especially vicious in times and places of widespread bank failures with their resulting displacements in the communities formerly served.

Respectfully sumbitted,
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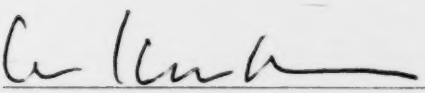

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PROOF OF SERVICE

I, Wm. Monroe Kerr, the undersigned counsel for Petitioner, William Hoyle McCright, Jr., and a member of the Bar of the Supreme Court of the United States, hereby certify that all parties required to be served with copies of the foregoing Petition for Writ of Certiorari have been served, and that I did such on the 24 day of September, 1987, by serving the United States by mailing three (3) copies of the Petition for Writ of Certiorari in a duly addressed envelope, with first class postage prepaid, as follows:

Honorable Charles Fried
Solicitor General
Department of Justice
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1747

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM HOYLE McCRIGHT, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(June 25, 1987)

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges.

REAVLEY, Circuit Judge:

Defendant William Hoyle McCright, Jr., appeals from his conviction on four counts, including two counts of misapplication of bank funds under 18 U.S.C. §§ 656 and 1006, and two counts of making false entries on reports of banks under 18 U.S.C. § 1005. McCright was sentenced to consecutive terms of three years imprisonment on each count and was fined $5,000 on each count, for a total sentence of twelve years, and a total fine of $20,000. On appeal, the government concedes that the conviction on count two for misapplication of bank funds under section 1006 should be reversed since that section does not apply to

bankers. Accordingly, we reverse McCright's conviction on count two; in addition, we find insufficient evidence to support a conviction on count one for misapplication of bank funds under section 656. However, we affirm McCright's conviction on the remaining two counts, and remand for resentencing.

I

Background

The evidence presented at trial revealed a long and complicated history of self-interested dealing by defendant William Hoyle McCright, Jr., while he was executive vice-president of First National Bank of Midland, Texas ("FNB" or "the Bank") between 1977 and 1982. We summarize only briefly below the several dealings that concern us on this appeal.

a. CEK

In 1978, Sam Conner and James Eastup joined McCright, a longtime friend, in a partnership they named CEK. The initials referred to Conner, Eastup and McCright, respectively. They decided to use "K" instead of "M" because they did not think "it would be wise" to let it be known that McCright was a partner, even though they owned equal shares in CEK. They opened an account at FNB listing only Conner and Eastup as partners. CEK borrowed substantial amounts from FNB to finance approximately 40 oil ventures and real estate deals, and McCright, in his capacity as an officer of FNB, approved most of the loans. In one instance, CEK used FNB financing to purchase a one-sixth interest in 60 acres of land for $11,000 an acre that they later sold for about $60,000 an acre. The proceeds were deposited in a CEK account at FNB, and later distributed in equal amounts to Conner, to Eastup and to

a money market account at Merrill Lynch subsequently transferred to McCright.

b. Wood & Locker and Myra Robinson

In 1976, Myra Robinson approached the trust department at FNB seeking investment advice from Marshall McCrea, an executive vice-president at the bank. McCright suggested to McCrea that she invest with John Wood whom McCright had known for a number of years. Over the next six years, Robinson invested over $7,000,000 in 35 to 40 oil drilling programs with Wood's company, Wood & Locker. For sending Robinson to him, Wood rewarded McCright with a twenty percent interest in Wood & Locker's twenty-five percent interest in the profits realized from Robinson's investments. McCright never informed McCrea, or anyone at FNB, of his reversionary interest in Robinson's investments.

c. Midland West Corporation

In 1977, Jerry Mobley, a golf professional, spoke with McCright at FNB about the possibility of building a new country club in Midland. After discussing several potential sites, McCright convinced Mobley to consider developing a tract of land owned by John Wood located near McCright's home. Wood expressed interest in the project, and, together with Mobley, Conner, Eastup, McCright and several other individuals, formed the Midland West Corporation. Although McCright was a shareholder (through CEK) and a member of the original board of directors for Midland, his name did not appear on the shareholder agreement.

Midland turned to FNB for financing, and subsequently received loans totaling over $6,000,000 for construction and maintenance of the club. At first, the only

officer at FNB supporting the loan was McCright, who argued strenuously for its approval, though he did not disclose his personal interest in the proposed transaction. In time, FNB approved the loan; McCright did not cast a vote for or against the decision, but remained silent when the vote was taken.

Midland sought further financing from FNB in July, 1981, then borrowing $1,925,000 in order to buy back the shares of McCright, Conner and Eastup at a cost of $5,000 per share. After the money was channeled through a Merrill Lynch money market account, McCright received $337,730 of this money for his shares of Midland.

d. The Bedford Ranch

In 1980, McCright purchased a one-sixth interest in the 2,294 acre Bedford ranch owned by the Bohannon family for $1,000,000. Conner, Eastup, H. G. Bedford and Rodney Robinson also bought interests. The Bohannons financed the sale and retained a security interest in the property. A year later, McCright convinced John Wood to buy the ranch at $1,500 per acre, for a total purchase price of $3,442,412.50. Wood arranged to buy the farm through his company, the Pen-Dee Corporation, and obtained financing from FNB in the amount of $998,268.15. McCright appraised the ranch for the bank at a value of $3,000 per acre, but did not inform the bank of his financial interest in the sale.

The sale was arranged in such a way that the Bohannons retained a primary lien on the ranch, and McCright and his partners retained a secondary security interest on the ranch. The bank was third in line with its lien. Wood defaulted after making three payments, and McCright and his partners foreclosed on the property and reacquired title to the ranch. The bank never collected the unpaid balance of its loan to Wood. In October, 1983, the bank failed,

and the unsatisfied note on the ranch was taken over by the FDIC.

e. The Atkins Prospect

McCright invested in certain oil wells with R. N. Hillin, a regular loan customer of his between 1978 and 1981. In one case, McCright had a 6.25% working interest in Hillin's Atkins Prospect in Pecos County which netted him a profit of $9,533 in 1982. CEK also participated actively in Hillin's projects. McCright never informed the bank of his participation in Hillin's investment activity.

f. H & M

The final transaction of concern involved two properties James Brock gave to McCright. Over the years McCright approved various loans for Brock's oil and gas investments. In 1973, for example, McCright approved a loan for $41,590.95, and on another occasion, in 1976, McCright approved a loan for $27,582.82. However, in 1980 Brock assigned 100% of his interest in two properties to McCright and his wife, which they accepted under the name H & M. The "H" stood for Hoyle, McCright's middle name, and "M" stood for Modell, his wife's first name. McCright explained to his accountant that these properties were a "gift from a friend."

II

The Counts of The Indictment

We emphasize at the outset that McCright's failure to disclose his conflicts of interest to FNB do not necessarily constitute violations of federal law. At trial and before this court, the government has repeatedly confused McCright's ethical shortcomings with the substantive

proscriptions of the United States Code. McCright's many violations of the bank's internal operating procedures do not alone create offenses prosecutable in federal court. *See United States v. Clark*, 765 F.2d 297, 303 (2d Cir. 1985). We do, of course, review the sufficiency of the evidence on each count in the light most favorable to the government's case. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

a. Count One: Misapplication of Bank Funds

The first count of the indictment concerned McCright's alleged participation in, and benefit from, the loan made by FNB to Midland West Corporation for development of the Green Tree golf course and country club. The indictment charged that McCright "willfully and knowingly did embezzle, misapply and cause to be misapplied monies and funds of the bank in the approximate sum of $1,925.000." Furthermore, the indictment charged that McCright's "personal financial interest in Midland West Corporation and in this loan was concealed by [McCright] from the board of directors of the bank in violation of the 'Standards of Conduct' of the bank and in violation of Title 18, United States Code Section 656."[1] That McCright's

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[1] 18 U.S.C. § 656 provides in pertinent part as follows:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

conduct violated the bank's "standards of conduct" we have no doubt; but we find no evidence to support a conviction under 18 U.S.C. § 656.

To establish a violation of section 656 the government must prove four elements:

> (1) that the accused was an officer, director, agent or employee of a bank; (2) that the bank was in some way connected with a national or federally insured bank; (3) that the accused willfully misapplied the monies or funds of the bank; and (4) that the accused acted with intent to injure or defraud the bank.

United States v. Farrell, 609 F.2d 816, 818 (5th Cir. 1980); *see also United States v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976). McCright does not dispute the first two elements of this test; he admits to being an officer of the bank at all times relevant to the $1,925,000 loan, and that FNB was a federally insured institution. He does, however, challenge the sufficiency of the government's proof that he willfully misapplied $1,925,000 in bank funds.

McCright contends that he could not be guilty of misapplying the 1981 loan to Midland since he was not the loan officer who approved it. The government argues, however, that McCright had an obligation to inform the bank of his interest in the loan's proceeds, and that his failure to do so led to the granting of the loan. In addition, the government contends that the 1981 loan was an extension of the previous 1977 loan to Midland, for which McCright had argued forcefully without disclosing his conflict of interest, and on which he had neither voted nor abstained when it was before the loan committee.

Although we do not believe McCright had to be the

lending agent in order to misapply bank funds in contravention of section 656, the statute does contemplate some causal connection between the defendant's actions as an officer or director of the bank and the making of the loan. Section 656 does not impose an affirmative duty on bank officers and directors to disclose their personal interest in loans that may be approved by other individuals or departments in the bank. Manifest in the use of the term "misapply" is a requirement that the defendant made, or influenced in a significant way, as an officer of the bank, the decision to extend the loan. *See United States v. Angelos,* 763 F.2d 859, 861 (7th Cir. 1985); *United States v. Twiford,* 600 F.2d 1339, 1341-42 (10th Cir. 1979). The government had the burden in this case to prove not only that McCright stood to benefit personally from the loan, but that he authorized, or caused the loan to be authorized, through his position at the bank.

The 1981 loan to Midland was authorized by Joel Mays, an executive vice-president of FNB. the government produced no evidence at trial showing that McCright participated in, or influenced in any way, Mays' decision to approve the $1,925,000 loan. Significant evidence supports, and McCright admits, that he strongly advocated the first Midland loan in 1977, and that he repeatedly urged the other members of the FNB loan committee to approve it. Yet, the government has not demonstrated any formal link between the 1977 and 1981 loans. The fact that the borrower was the same on both occasions is not enough. We find no causal connection between McCright's 1977 advocacy and his benefitting from the 1981 loan, and therefore no violation of section 656 as regards the latter loan.

b. Count Three: False Entry in a Bank Questionnaire I

The third count of the indictment charged that

McCright "willfully and knowingly, and with intent to defraud and injure the bank," made a false entry in the February, 1982 "executive officers' and directors' questionnaire" (the "February questionnaire") in violation of 18 U.S.C. § 1005.[2] The purpose of the February questionnaire was to gather information for the 1982 proxy statement and to comply with Regulation O. Regulation O was issued pursuant to the Federal Reserve Act, 12 U.S.C. §§ 248(i), 375a, 375b, and 12 U.S.C. § 1817(k), and, in accordance with that Act, set limits and reporting requirements on loans made by banks to their executive officers, directors and principal shareholders.[3] 12 C.F.R. §§ 215.4, 215.7,

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[2] 18 U.S.C. § 1005 provides in pertinent part as follows:

> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System --
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

[3] In 1978, Congress amended the Federal Reserve Act by establishing strict guidelines for member banks to follow when lending funds to insiders and their related interests. 12 U.S.C. § 375b(5); *see* C.F.R. § 215.1. Section 375b was just one part of a broad-reaching update of the Federal Reserve Act intended to respond to the many changes in the banking industry since the last major reform was made in the 1930s. The need for this legislation became apparent after several major banks failed, partly due to insider abuses, as well as the much publicized past activities of Bert Lance, the Director of the Office of Management and Budget in 1977. The bill's House sponsor announced that this legislation heralded a new day for bank regulation in this country: "It clearly emphasizes that bankers and savings and loan executives are operating with other people's money and that charters for financial institutions are not franchises to establish playpens for insiders." H. R. Rep. No. 1383, 95th Cong., 2d Sess. 200, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9273, 9331.

215.8. The indictment listed three interests that McCright allegedly was required to disclose, but did not: (1) the 6.25% interest in the Atkins Prospect in Pecos County; (2) the reversionary interest in the investment activity of Myra Robinson; and (3) the one-sixth interest in the collateral securing the FNB loan to Pen-Dee Corporation. If substantiated by sufficient evidence, each of these allegations would individually support a conviction under this count. Therefore, the government must only prove the sufficiency of the evidence on one of its charges to prevail. *United States v. Georgalis*, 631 F.2d 1199, 1205 (5th Cir. 1980); *Myrick v. United States*, 332 F.2d 279, 281 (5th Cir. 1963), *cert. denied*, 377 U.S. 952, 84 S.Ct. 1630, 12 L.Ed.2d 497 (1964). Accordingly, we limit our analysis to the third allegation, since the evidence supports a finding that McCright violated section 1005 by causing a false entry to be made in the bank's records, with intent to injure or defraud the bank, when he failed to disclose his interest in the Bedford ranch.

As an initial matter, McCright argues that his conviction on count three should be set aside because of a variance between the allegation in the indictment and the proof at trial. The indictment charged McCright with failing to report "a 1/6 right to collateral securing a First National Bank of Midland loan in the sum of $2,444,000 to Pen-Dee Corporation." The $2,444,000 figure, he points out, was the amount of the note retained by the sellers of the Bedford ranch, not the amount loaned to Wood's Pen-Dee Corporation. In fact, Wood received $998,268.45 in funds from FNB. The government concedes its error, but asserts that it "was an immaterial variance between a superfluous averment and the proof at trial." The government contends that the variance did not prejudice McCright's defense in any way, since throughout the trial he manifested a clear understanding of the substance of the allegation.

The existence of a variance between a charge in the indictment and the proof at trial does not require automatic reversal of a conviction. *United States v. Bruno*, 809 F.2d 1097, 1103 (5th Cir. 1987). "In order for a variance to warrant reversal, it must affect the substantial rights of the accused." *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 756, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946)). A careful reading of the trial transcript convinces us that McCright fully understood the nature of the charge. His counsel's pointed cross-examination of witnesses on this issue unequivocally demonstrates this understanding. *See United States v. Salinas*, 654 F.2d 319, 324 (5th Cir. 1981). Indeed, in his briefs to this court McCright does not suggest that he was misled by the careless drafting of the indictment, or that any substantial rights were infringed. He argues simply that the variance alone required reversal. We disagree, and find that no prejudice resulted from the variance between the charge and the proof at trial that would lead us to set aside the jury's verdict.

McCright also challenges his conviction on the third count of the indictment by arguing that the 1982 questionnaire did not require disclosure of his one-sixth interest in the Bedford ranch. The questionnaire asked McCright to respond as follows:

> (1) Please list any corporation, partnership, trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization or other form of business entity . . . of which you . . . :
>
> > (c) Own, control or have the power to vote 10 percent or more of the total interest in the entity *but* only if you also participate or have the authority to participate in major policy making functions of the entity or are a director of the entity.

The phrasing of the questionnaire closely resembles that of Regulation O,[4] for which the information was to be used.

McCright contends that his undivided one-sixth interest in the land did not fall within the purview of the questionnaire or Regulation O. The basis for this assertion is not entirely clear from his briefs, but apparently stems from a belief that landed interests do not constitute a form of business entity. Although some forms of land ownership would not be considered business-related, McCright's interests in the Bedford ranch was his participation in a joint business project. In 1980 he and several other individuals bought the ranch, and one year later sold it for a substantial profit. McCright admitted to the FBI agent investigating the case that the purchase was intended as an investment, and that all of the buyers expected to turn around and sell it at a profit. Sam Conner, another one-sixth owner and McCright's partner in CEK, testified at trial that they planned "to hold it for capital gains," and then "try to sell it in one block rather than break it up" shortly thereafter. Based on this evidence, McCrights participation in the joint venture to purchase and sell the Bedford ranch unquestionably constituted the type of business enterprise that should have been disclosed on the questionnaire. Moreover, the evidence overwhelmingly

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[4] Regulation O governs extensions of credit by a "member bank . . . to any of its executive officers, directors, or principal shareholders or to any related interest of that person." 12 C.F.R. § 215.4(a). A "related interest" is "[a]ny company controlled by" the director or officer. *Id.* § 215.10(a)(2). A person has "control of a company" if he "[o]wns, controls, or has the power to vote 25 percent or more of any class of voting securities of the company." *Id.* §215.2(b)(1)(i). A person is *presumed* to have such "control" if he is an executive officer or director of the company and he "directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company"; if he is not a director or officer, a person may be presumed to have control if he owns more that 10 percent, and "no other person owns, controls, or has the power to vote a greater percentage of that class of voting securities." *Id.* § 215.2(b)(2)(i) and (ii).

supports the jury's verdict that in failing to disclose this interest McCright intended to injure or defraud the bank in violation of section 1005. Therefore, we uphold the conviction on the third count of the indictment.

Count Four: False Entry in a Bank Questionnaire II

The fourth count of the indictment charged McCright with falsely answering a question in a bank questionnaire dated June 17, 1982 (the "June Questionnaire"), with intent to defraud the bank, in violation of 18 U.S.C. § 1005. McCright answered "none" to the following question:

> Question 8
>
> With regard to yourself, your associates and/or any firm, corporation or other entity with which you have a position or relationship, please describe any material interest, direct or indirect, in any transaction occurring since January 1, 1981, or in any present or proposed transaction, to which FNB . . . is or is to be a party.[5]

McCright advances three arguments for setting aside his conviction on this count. First, he contends that none of his interests were "material," as that term is contemplated by the questionnaire. Second, he claims to have

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[5] The question emphasized that it "relates to indirect, as well as direct, material interests and transactions." It also explained that "[a] person who has a position or relationship with a firm, organization, or other entity which engages in a transaction with FNB or any of its subsidiaries may be considered to have an indirect interest in such transaction by reason of such position or relationship." The appendix to the June Questionnaire defined "associate" as "any corporation or organization . . . of which you are an officer or partner or of which you are directly or indirectly the beneficial owner of 10% or more of any class of equity securities."

resigned as a director of FNB prior to filling out the questionnaire, thus removing him from the scope of section 1005. Finally, he argues that use of his negative answer to question eight would violate his Fifth Amendment right against self-incrimination. We consider McCright's contentions in turn, but find no merit in any of them.

As noted above, the bank prepared the June Questionnaire in order to gather information for its 1982 proxy statement. Consistent with this purpose, the appendix to the questionnaire defined "material" as "those matters to which an average prudent investor ought reasonably to be informed before buying or selling the security registered." McCright asserts that this definition is too vague, and that its meaning in question eight must be gleaned from other questions in the form. Specifically, questions seven and nine also requested certain disclosures, but set the lower limit for disclosures at $5 million.[6] We cannot accept McCright's sophistic argument that because other questions on the form had a $5 million cutoff, question eight must have had the same. Indeed, his premise compels just the opposite conclusion: if a specific limit were intended on question eight it would have been stated therein. In any case, McCright's concern that a simple misreading of a bank form could lead to a felony conviction under section 1005 is misplaced. Under this section a defendant must be found to have made a false entry *with intent to injure or defraud* the bank. This necessary element was amply demonstrated in the present case.

McCright next claims that he resigned as a director

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[6] Question seven queried whether the respondent was "indebted at any time since January 1, 1981 to FNB in aggregate amount of $5 million or more." Question nine asked respondent-directors if they were or had been a director, officer, employee or owner of a ten percent equity in any firm that had made, or proposes to make, payments to, or was indebted to, FNB in excess of $5 million, within the last two fiscal years.

on June 11, 1982, one week before completing the questionnaire, in a telephone conversation with Charles Fraser, the bank's president. Yet Agent Stroz of the FBI testified that McCright told him that he resigned in July, 1982. In fact, McCright signed the questionnaire, dated June 17, 1982, listing his title as "director." Based on this evidence, we cannot say that the jury erred in finding McCright to have been a director when he completed the questionnaire.

Finally, McCright invokes the "exculpatory no" doctrine, claiming that his answer on question eight cannot be used against him without violating his Fifth Amendment right against self-incrimination. We have excluded from 18 U.S.C. § 1001's coverage "mere negative responses to questions propounded . . . by an investigating agent during a question and answer conference, not initiated by the [defendant]." *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962). In *United States v. Lambert*, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (en banc), we said that the "exculpatory no" decisions originate "at least in part from latent distate for an application of the statute that is uncomfortably close to the Fifth Amendment." However, this circuit has never applied the doctrine outside section 1001 cases, and, in fact, has specifically stated that the "doctrine is *only* a creature of section 1001." *United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982).

This case presents none of the circumstances usually associated with the "exculpatory no" notion. The bank form in question was not part of, or for use in, a government investigation; nor was it promulgated by a government agency or in accordance with a statute. *Hajecate*, 683 F.2d 900-901. The questionnaire was strictly administrative in scope, and did not implicate the defendant's Fifth Amendment rights. *Id.* We therefore, uphold the conviction on the fourth count of the indictment.

The convictions on counts one and two are reversed. The sentences are all vacated and the case is remanded for resentencing.

REVERSED AND REMANDED.

APPENDIX B

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation .

June 25, 1948, c. 645, 62 Stat. 750.

APPENDIX C

§ 375b. Prohibitions respecting loans and extensions of credit to executive officers and directors of banks, political or campaign committees, etc.

(1) No member bank shall make any loan or extension of credit in any manner to any of its executive[1] officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, except in the case of such a bank located in a city, town, or village with less than thirty thousand in population, in which case such per centum shall be 18 per centum, or to any company controlled by such an executive officer or person, or to any political or campaign committee the funds or services of which will benefit such an executive officer or person or which is controlled by such an executive officer or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer or person and to all companies controlled by such executive officer or person and to all political or campaign committees the funds or services of which will benefit such executive officer or person or which are controlled by such executive officer or person, would exceed the limits on loans to a single borrower established by section 84 of this title. For purposes of this paragraph, the provisions of section 84 of this title, shall be deemed to apply to a State member bank as if such State member bank were a national banking association.

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum

of any class of voting securities of such member bank, or to any company controlled by such an executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive, director, or person or which is controlled by such executive officer, director, or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer, director, or person and to all companies controlled by such executive officer, director, or person and to all political or campaign committees the funds or services of which will benefit such executive officer, director, or person or which are controlled by such executive officer, director, or person, would exceed an amount prescribed in a regulation of the appropriate Federal banking agency, unless such loan, line of credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(4) No member bank any pay an overdraft on an account at such bank of an executive officer or director.

(5) For purposes of this section, an executive officer, director, or person shall be considered to have control of a company if such executive officer, director, or person, directly or indirectly or acting through or in concert with one or more other persons—

(A) owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the company;

(B) controls in any manner the election of a majority of the directors of the company; or

(C) has the power to exercise a controlling influence over the management or policies of such company.

(6) For the purposes of this section—

(A) the term "person" means an individual or company;

(B) the term "company" means any corporation, partnership, business trust association joint venture, pool syndicate, sole proprietorship, unincorporated organization, any other form of business entity not specifically listed herein, or any other trust, but shall not include any insured bank or any corporation the majority of shares of which is owned by the United States or by any State.

(C) a person shall be deemed to be a "director" of a member bank or a "person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has power to

vote more than 10 per centum of any class of voting securities of a member bank" if such person has such relationship with any bank holding company of which such member is a subsidiary, as defined by the Bank Holding Company Act [12 U.S.C.A. § 1841], or with any other subsidiary of such bank holding company;

(D) a person shall be deemed to be an "officer" of a member bank if such person is an officer of any bank holding company of which such member bank is a subsidiary, as defined by the Bank Holding Company Act [12 U.S.C.A. § 1841], or with any other subsidiary of such bank holding company;

(E) the term "executive officer" has the same meaning assigned such term under section 375a of this title; and

(F) the term "pay an overdraft on an account" means the payment by a member bank of an amount for an account holder in excess of the funds on deposit in the account and does not include a payment of funds by the member bank in accordance with either a written preauthorized, interest-bearing extension of credit specifying a method of repayment or a written preauthorized transfer of funds from another account of the account holder at that bank.

(7) the Board of Governors of the Federal Reserve System may prescribe such rules and regulations, including definitions of terms, as it deems necessary to effectuate the purposes and to prevent evasions of this section. The Board may further prescribe rules providing a reasonable period of time after November 10, 1978, within which the amount of outstanding loans or extensions of credit made prior to November 10, 1978, shall be reduced so as to conform to the limitations of this section.

APPENDIX D

PART 215—LOANS TO EXECUTIVE OFFICERS, DIRECTORS, AND PRINCIPAL SHAREHOLDERS OF MEMBER BANKS

Subpart A—Loans by Member Banks to Their Executive Officers, Directors, and Principal Shareholders

§ 215.1 Authority, purpose, and scope.

(b) *Purpose and scope.* This subpart governs any extension of credit by a member bank to an executive officer, director, or principal shareholder of (1) the member bank, (2) a bank holding company of which the member bank is a subsidiary, and (3) any other subsidiary of that bank holding company. It also applies to any extension of credit by a member bank to (1) a company controlled by such a person and (2) a political or campaign committee that benefits or is controlled by such a person. This subpart also implements the reporting requirements of 12 U.S.C. 375a concerning extensions of credit by a member bank to its executive officers and of 12 U.S.C. 1817(k) concerning extensions of credit by a member bank to its executive officers and principal shareholders.

(44 FR 67978, Nov. 28, 1979)

§ 215.2 Definitions.

For the purposes of this subpart, the following definitions apply unless otherwise specified:

(a) "Company" means any corporation, partnership, trust (business or otherwise), association, joint venture, pool syndicate, sole proprietorship, un-incorporated

organization, or any other form of business entity not specifically listed herein. However, the term does not include (1) an insured bank (as defined in 12 U.S.C. 1813(h)) or (2) a corporation the majority of the shares of which are owned by the United States or by any State.

(b)(1) "Control of a company or bank" means that a person directly or indirectly, or acting through or in concert with one or more persons:

(i) Owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the company or bank;

(ii) Controls in any manner the election of a majority of the directors of the company or bank; or

(iii) Has the power to exercise a controlling influence over the management or policies of the company or bank.

(2) A person is presumed to have control, including the power to exercise a controlling influence over the management or policies, of a company or bank if:

(i) The person is (A) an executive officer or director of the company or bank and (B) directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company or bank; or

(ii) (A) The person directly or indirectly owns, controls, or has the power to vote more than 10 percent of any class of voting securities of the company or bank, and (B) no other person owns, controls, or has the power to vote a greater percentage of that class of voting securities.

(k) "Related interest" means (1) a company that is controlled by a person or (2) a political or campaign committee that is controlled by a person or the funds or services of which will benefit a person.

No. 87-553

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM HOYLE MCCRIGHT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions on two counts of making false entries on bank reports, in violation of 18 U.S.C. 1005.

2. Whether petitioner's conviction on one of the two counts must be vacated under the "exculpatory no" doctrine.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 821 F.2d 226.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1987. A petition for rehearing was denied on August 26, 1987. The petition for a writ of certiorari was filed on October 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of misapplication of bank funds (Count 1), in violation of 18 U.S.C. 656; fraudulent participation in a bank loan (Count 2), in violation of 18 U.S.C. 1006; and making false entries on bank reports (Counts 3 and 4), in violation

of 18 U.S.C. 1005. He was sentenced to consecutive terms of three years' imprisonment on each count, and he was fined $5,000 on each count, for a total sentence of 12 years' imprisonment and a total fine of $20,000. The court of appeals reversed petitioner's convictions on Counts 1 and 2 and affirmed his convictions on Counts 3 and 4. The court vacated all of the sentences and remanded for resentencing. Pet. App. A1-A2.

1. Between 1977 and 1982, petitioner was one of two Executive Vice Presidents of the First National Bank of Midland, Texas; he also served as a member of the bank's board of directors. The evidence at trial revealed "a long and complicated history of self-interested dealing" by petitioner (Pet. App. A2). In 1978, petitioner formed a partnership with Sam Conner and James Eastup, which they named "CEK." The court of appeals explained: "The initials referred to Conner, Eastup and McCright, respectively. They decided to use 'K' instead of 'M' because they did not think 'it would be wise' to let it be known that McCright was a partner, even though they owned equal shares in CEK." *Ibid.* CEK borrowed "substantial amounts from [petitioner's bank] to finance approximately 40 oil ventures and real estate deals" (*ibid.*). Petitioner approved many of the loans, but his name was never reflected on the notes as one of the borrowers (see 3 R. 106-107; GX 12). When the profits were subsequently divided, they were funneled through another account, usually a Merrill Lynch money market account, before petitioner received his share. That procedure had the effect of concealing petitioner's participation in the partnership. Pet. App. A2-A3, A4.

In 1980, petitioner purchased a one-sixth interest in the Bedford ranch. Conner and Eastup also purchased one-sixth shares, and two other persons each purchased one-quarter shares. One year later, the five co-owners sold the ranch to Pen-Dee Corporation, which borrowed approxi-

mately $1 million from petitioner's bank to finance the purchase. Petitioner appraised the property for the bank, estimating its value at twice the sale price, without disclosing his financial interest in the sale. The loans were structured in a way that the sellers' lien on the property was superior to the bank's lien. Pen-Dee subsequently defaulted on the loan, and petitioner and the other sellers regained title to the ranch. The bank, which never collected the unpaid balance of its loan, failed in 1983. Pet. App. A4-A5.

2. Petitioner's bank, which was federally insured, required its officers and directors to disclose certain interests and investments that involved the bank or customers of the bank. The information was gathered to comply with "Regulation O" (12 C.F.R. 215), which requires the disclosure of loans to executive officers, directors, and principal shareholders of banks, and to obtain information that should be disclosed to the bank's shareholders or potential investors. See Pet. App. A9. In February 1982, petitioner filed a response to a questionnaire that asked him to "list any corporation, partnership, trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization or other form of business entity * * * of which you * * * [o]wn, control or have the power to vote 10 percent or more of the total interest in the entity" (*id.* at A11). Petitioner did not reveal that he held a one-sixth interest in the business entity that had purchased the Bedford ranch and then sold it to Pen-Dee Corporation, retaining a security interest. His failure to do so was the basis for the charge in Count 3 of the indictment that petitioner had violated the bank false statement statute, 18 U.S.C. 1005.[1]

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[1] The indictment also charged that petitioner failed to reveal in response to the form that he held interests in two other business entities. The court of appeals affirmed the conviction on the basis of petitioner's failure to reveal his interest in the ranch. Pet. App. A10.

In June 1982, petitioner completed another questionnaire for the bank. Question 8 stated (see Pet. App. A13): "With regard to yourself, your associates and/or any firm, corporation or other entity with which you have a position or relationship, please describe any material interest, direct or indirect, in any transaction occurring since January 1, 1981, or in any present or proposed transaction, to which [petitioner's bank], its subsidiaries or any of the employee benefit plans, retirement plans or trusts of either [petitioner's bank] or any of its subsidiaries, was, is or is to be a party." Petitioner responded "none," even though he held a one-third interest in CEK, which had engaged in numerous transactions with the bank. That response was the basis for the charge in Count 4 of the indictment, which alleged a violation of Section 1005.

3. The court of appeals upheld petitioners' convictions on Counts 3 and 4 (Pet. App. A8-A16). With respect to Count 3, the court rejected petitioner's argument, which was based on his "belief that landed interests do not constitute a form of business entity" (*id.* at A12), that he did not have to disclose his one-sixth interest in the business entity holding a secured interest in the Bedford ranch in response to the February 1982 questionnaire. The court concluded that "[a]lthough some forms of land ownership would not be considered business related," petitioner's "participation in the joint venture to purchase and sell the Bedford ranch unquestionably constituted the type of business enterprise that should have been disclosed on the questionnaire" (*ibid.*). It added that "the evidence overwhelmingly supports the jury's verdict that in failing to disclose this interest [petitioner] intended to injure or defraud the bank," an element of Section 1005 (Pet. App. A12-A13).

With respect to Count 4, the court first rejected petitioner's contention that the government had failed to prove that he had a "material interest," as Question 8 of

the June 1982 questionnaire specified, in any transaction to which the bank was a party. Petitioner contended that, because two other questions on the questionnaire required the disclosure of interests only where the bank was owed at least $5 million (see Pet. App. A14 & n.6), he reasonably assumed that a "material interest" existed only in such circumstances. The court noted that the questionnaire defined " 'material' " as " 'those matters to which an average prudent investor ought reasonably to be informed before buying or selling the security registered' " (*id.* at A14). It then rejected his "sophistic argument that because other questions on the form had a $5 million cutoff, question eight must have had the same," adding that "his premise compels just the opposite conclusion: if a specific limit were intended on question eight it would have been stated therein" (*ibid.*). The court further stated that petitioner's argument that "a simple misreading of a bank form could lead to a felony conviction under section 1005 is misplaced," because that statute requires proof of a false entry made with intent to injure or defraud, adding that "[t]his necessary element was amply demonstrated in the present case" (*ibid.*).

Finally, the court rejected petitioner's argument, made with respect to Count 4, that his conviction is barred by the "exculpatory no" doctrine. The court noted (Pet. App. A15) that it had held in prosecutions under 18 U.S.C. 1001, which prohibits false statements to federal officials, that mere negative responses to questions propounded by a federal investigator are not criminal when a true answer would be incriminating. However, the court stated, the "exculpatory no" doctrine does not extend beyond Section 1001 and, in any event, the June questionnaire "presents none of the circumstances usually associated with the 'exculpatory no' notion * * * [since it] was not part of, or for use in, a government investigation" (Pet. App. A15).

ARGUMENT

1. Petitioner first renews his contention (Pet. 7-10) that the evidence did not support his conviction on Count 3. He argued that he did not have to disclose on the February 1982 form his one-sixth interest in the business entity that held a secured interest in the Bedford ranch since the interest in question was an interest in land. As the court of appeals concluded (Pet. App. A12), however, there is no merit to that argument. The question at issue asked petitioner to disclose the identity of any business entity in which he had a ten percent interest (*id.* at A11). The evidence at trial showed that petitioner had a sixteen percent interest in the group that bought the ranch and, after its sale, held a secured interest in it. The evidence further showed that that investment was made with his partners in CEK—Conner and Eastup—and that they bought the land for the purpose of selling it later for capital gains (*id.* at A12). Petitioner's interest in the property was plainly the type of business interest that should have been disclosed on the questionnaire.[2]

Petitioner next argues (Pet. 10-11) that the evidence did not support his conviction on Count 4 because the government failed to prove that the transactions that he did not disclose in response to the June 1982 questionnaire had a "material" effect on the bank. Petitioner primarily argues (an argument not made below) that the definition of "material" under the Securities Act of 1933, 15 U.S.C. (& Supp. IV) 77a *et seq.*, is relevant and requires proof relating to the financial condition of the bank and the effects of the transactions on the price of its stock. There is no basis for that argument. The relevant definition of

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[2] Petitioner argues (Pet. 8-9) that, assuming that the question was meant to include business interests in land, he was not required to disclose his interest because it was less than a twenty-five percent interest. However, the question asked for the disclosure of interests exceeding ten percent (Pet. App. A11).

"material" is the definition contained in the questionnaire, which asked for information that an average prudent investor would want to know (Pet. App. A14). Because petitioner held a concealed one-third interest in CEK, while approving loans to it, he was lending the bank's money to himself, and a prudent investor would surely want to know about such transactions. Accordingly, the court of appeals correctly held that petitioner should have disclosed his one-third interest in CEK in response to Question 8 on the June 1982 questionnaire.

2. Nor is there merit to petitioner's argument (Pet. 11-12) that his conviction on Count 4 is barred by the "exculpatory no" doctrine. As the court of appeals stated (Pet. App. A15), that rule, which has never been extended to a Section 1005 prosecution, is not applicable here since petitioner's false statement was not made to a government investigator during the course of a criminal investigation. See, *e.g.*, *United States* v. *Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc); *Paternostro* v. *United States*, 311 F.2d 298, 305 (5th Cir. 1962). Moreover, while petitioner's disclosure of his interest in CEK would have revealed a blatant conflict of interest, it would not necessarily have shown that he had committed a crime. To the extent that the "exculpatory no" doctrine is based on the Fifth Amendment's protection against compulsory self-incrimination (Pet. App. A15; *Lambert*, 501 F.2d at 946 n.4), the doctrine would be inapplicable for that reason as well. In addition, allowing false negative answers by bank officers to questions concerning their interests in outside entities doing business with the bank would totally frustrate the purpose of Section 1005, which is to ensure that the bank's records accurately reflect the condition of the bank (*United States* v. *Giles*, 300 U.S. 41, 48 (1937); *United States* v. *Darby*, 289 U.S. 224, 226 (1933)), since bank officers could distort bank records yet avoid prosecution by failing to reveal conflicts of interest. Accordingly, as the

court of appeals concluded, the "exculpatory no" doctrine should not be extended to Section 1005.

To be sure, the court of appeals' conclusion that the "exculpatory no" doctrine does not extend beyond Section 1001 prosecutions is contrary to an Eleventh Circuit decision, *United States* v. *Payne,* 750 F.2d 844 (1985), which stated that the doctrine applies in prosecutions under 18 U.S.C. 1006. The difference of opinion between the two circuits regarding the applicability of the "exculpatory no" doctrine in cases other than Section 1001 prosecutions is not a conflict that warrants review in this case, however. Regardless of its applicability to Section 1005 prosecutions, the "exculpatory no" doctrine would not have been available in this case under any circuit's test. Thus, the Eleventh Circuit would have found the "exculpatory no" doctrine inapplicable to petitioner's conduct and would have upheld the conviction here.

In the *Payne* case, the President of a federal land bank made false entries on a conflict of interest form regarding his participation in some land transactions. The Eleventh Circuit concluded (750 F.2d at 861-863) that the "exculpatory no" doctrine extends to Section 1006, which prohibits false statements to federal land banks, but held that the exception did not apply in the circumstances of that case (750 F.2d at 864-866).[3] The court stated that "the 'exculpatory no' doctrine requires the reversal of a false statement conviction under 18 U.S.C. § 1006 only if truthful affirmative answers would have been incriminating" and

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[3]One judge concurred, noting that, since the court concluded that the "exculpatory no" doctrine did not require reversal of the defendant's conviction, that part of its opinion concluding that the doctrine applied in Section 1006 prosecutions was "not necessary to the decision" (750 F.2d at 867). Under that view, the conclusion in *Payne* that is contrary to the decision below is mere dictum.

further ruled that the "exculpatory no" rule "is properly characterized as an 'affirmative defense' on which the defendant must bear the burden of proof" (*id.* at 863 & n.22). It then held that the defendant "did not establish that he reasonably believed that truthful affirmative answers would have been incriminating" (*id.* at 865). That court presumably would have reached the same conclusion here, since petitioner (who put on no evidence at trial (Pet. 7)) did not establish that a truthful answer to Question 8 would have been incriminating.[4] Accordingly, there is no disagreement among the courts of appeals that warrants this Court's attention in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] In fact, from all that appears, a truthful answer would *not* have been incriminating. Regulation O regulates but does not prohibit all loans to insiders (see 12 C.F.R. 215.4 and 215.5), and it provides for civil, but not criminal, penalties (12 C.F.R. 215.11).

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